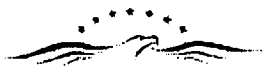

November 17, 2008

Chief Justice Ronald M. George and the
Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Letter Brief of *Amicus Curiae* the American Center for Law and Justice Recommending Denial of Request for Stay in *City and County of San Francisco, et al. v. Horton, et al.*, Case No. S168078

Honorable Justices:

The American Center for Law and Justice (ACLJ), on behalf of itself, submits this *amicus curiae* letter brief to address the following 3 points:

1. The Petitioners lack standing to challenge the enactment of Proposition 8.

2. The Petitioners bear a heavy burden of persuasion in challenging Proposition 8—a duly enacted constitutional amendment—in light of the great weight that the California Constitution affords to the will of the people.

3. This Court's precedents support the conclusion that Proposition 8 is an amendment, not a revision, to the California Constitution.

Interest of *Amicus Curiae*

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ has argued and participated as *amicus curiae* in numerous cases before the Supreme Court of the United States and other courts around the county in a variety of significant cases involving questions of constitutional law. Regarding the definition of marriage, the ACLJ is committed to preserving the traditional institution of marriage as the union of one man and one woman.

I. The Petitioners Lack Standing to Challenge the Enactment of Proposition 8.

The City and County of San Francisco, the County of Santa Clara, and the City of Los Angeles cannot show any cognizable harm to them from the passage of Proposition 8. "The purpose of the standing requirement [under California jurisprudence] is to ensure that the courts will decide only actual controversies between the parties with a sufficient interest in the subject matter of the suit to press their case with vigor." *Common Cause of California v Bd. of Supervisors of Los Angeles County* (1989) 49 Cal. 3d 432, 439. "The fundamental issue of standing is that it focuses on the party seeking to get his complaint before a . . . court, and not on the issues he wishes to have adjudicated." *Harmon v. City & County of San Francisco* (1972) 7 Cal. 3d 150, 159. "One who invokes the judicial process does not have 'standing' if he or those whom he represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered or is about to suffer . . . any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be reasonably presented." *Bilafer v. Bilafer* (Ct. App. 2008) 161 Cal. App. 4th 363, 370.

Applying these standards to the case at hand, the Petitioners cannot demonstrate that they have suffered, or are about to suffer, a sufficiently great injury that would give rise to standing to challenge the passage of Proposition 8. The City and County of San Francisco, the County of Santa Clara, and the City of Los Angeles cannot establish that they possess rights or interests that were implicated by the enactment of Proposition 8, nor can they establish any irreparable harm that would occur absent a stay of its enforcement. It is certain that some citizens of San Francisco, Santa Clara, and Los Angeles voted in favor of Proposition 8 while others voted against it, yet that does not provide these petitioners with a sufficient stake to challenge Proposition 8's validity. To the contrary, as the next section explains, their citizens possess the right to amend the California Constitution through measures such as Proposition 8. There is simply no live, adversarial dispute between these Petitioners and the Defendants.

II. Petitioners' Bear a Heavy Burden of Persuasion in Challenging Proposition 8—A Duly Enacted Constitutional Amendment—In Light of the Great Weight that the California Constitution Affords to the Will of the People.

The California Constitution places the people in a preferred position through a variety of provisions, giving effect to the enduring American principle that Governments "deriv[e] their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). As this Court has recently explained:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process"

> [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." [Citations.]

Indep. Energy Producers Ass'n v. McPherson (2006) 38 Cal. 4th 1020, 1032 (2006) (quoting *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 591).

This strong presumption in favor of the people's authority to act applies in situations where, as here, a litigant claims that a ballot initiative effected a revision to the California Constitution rather than an amendment. *See, e.g., Legislature v. Eu* (1991) 54 Cal. 3d 492, 512 ("Resolving, as we must, all doubts in favor of the initiative process, we conclude that nothing on the face of Proposition 140 effects a constitutional revision"); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 248 ("*Amador Valley*") ("Consistent with our own precedent, in our approach to the constitutional analysis of article XIII A if doubts reasonably can be resolved in favor of the use of the initiative, we should so resolve them"). Since "the initiative process itself adds an important element of direct, active, democratic contribution by the people," *Amador Valley*, 22 Cal. 3d at 228, the people's initiative power "'must be liberally construed . . . to promote the democratic process.'" *Id.* at 219 (quoting *San Diego Bldg. Contractors Ass'n v. City Council* (1974) 13 Cal. 3d 205, 210, n.3); *see also id.* at 248 (Bird, C.J., concurring and dissenting) ("Initiatives by their very nature are direct votes of the people and should be given great deference by our courts. Judges should liberally construe this power so that the will of the people is given full weight and authority").

While the fact that the people have clearly expressed their will to amend the California Constitution through Proposition 8 does not entirely insulate that decision from judicial review, see *In re Marriage Cases* (2008) 43 Cal. 4th 757, 852-53, it is also true that "judicial restraint and caution . . . should always apply, under separation of powers principles, before clear expressions of popular will on fundamental issues are overturned." *Id.* at 869, n.9 (Baxter, J., concurring and dissenting). "The principle of judicial restraint is a covenant between judges and the people from whom their power derives. It protects the people against judicial overreaching." *Id.* at 883 (Corrigan, J., concurring and dissenting). In other words, this Court's longstanding practice of resolving any doubts in favor of the use of the initiative power is a means of recognizing that the people are the ultimate source of the government's authority. As Thomas Jefferson famously stated, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) (quoted by *Polec v. Northwest Airlines* (6th Cir. 1996) 86 F.3d 498, 533 n.22).

In this vein, the Petitioners' claim that "a temporary stay of Proposition 8's enforcement . . . will harm no one . . . [and] the rights of other Californians will not be affected in any way by the preliminary relief Petitioners seek," Strauss Amended Petition for Extraordinary Relief at 43-44, is simply untrue. The people have spoken clearly and unequivocally regarding the definition of marriage, and the amendment they approved took effect the day after it was enacted. *See* CAL. CONST. art. XVIII § 4. As discussed previously, the people's reserved power to express their will

through an initiative or referendum is "one of the most precious rights of our democratic process." *Indep. Energy Producers Ass'n*, 38 Cal. 4th at 1032 (citation omitted).

In this case, the status quo is that the people have exercised their "precious right[]" at the ballot box, and any delay in the enforcement of their expressed will imposes irreparable harm upon the millions of Californians who exercised that right. This is especially true where, as here, the people have exercised their authority to restore a legal principle that dates back to the founding of the State. *See In re Marriage Cases*, 43 Cal. 4th at 792 ("From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman").

III. This Court's Precedents Support the Conclusion that Proposition 8 is an Amendment, Not a Revision, to the California Constitution.

Proposition 8 is a validly enacted amendment to a single provision of the California Constitution. Contrary to Petitioners' assertions, Proposition 8 does not create far reaching, sweeping, or profound changes in the state's constitutional scheme. Rather, it merely clarifies the definition of a single right recognized in the California Constitution. As such, Proposition 8 does not rise to the level of a constitutional revision.

Article XVIII of the California Constitution distinguishes between amendments and revisions to that instrument. According to Sections 1 and 2 of the article, revisions to the constitution may be effected in two ways: (1) two-thirds of both houses of the legislature agree upon a proposed revision, and a majority of the voting citizens of California vote in favor of the revision; or (2) the legislature votes to call a constitutional convention which then enacts a revision. *See* CAL. CONST. art. XVIII §§ 1, 2, 4. Similarly, an amendment to the California Constitution may be effected in two ways. The first means of amending the constitution is identical to the first means of revising the constitution. The additional manner in which the constitution may be amended is through a voter initiative. *See* CAL. CONST. art. XVIII, §§ 1, 3, 4. In other words, an amendment to the California Constitution is valid if it is properly submitted to the voting citizens of California as a ballot proposition and a majority of those voting approve the amendment.

The distinction between a constitutional amendment on the one hand and a revision on the other is thus, at its core, a matter of procedure. Specifically, enactment of a revision requires a far more arduous process than does enactment of an amendment. The reason for this, as this Court has explained, is that "the term 'revision' in section XVIII originally was intended to refer to a substantial alteration of the entire Constitution, rather than to a less extensive change in one or more of its provisions." *Amador Valley*, 22 Cal. 3d at 222. As the *Amador Valley* Court acknowledged, prior decisions of this Court had likewise recognized that a revision is defined by "the 'far reaching and multifarious substance of the measure'" or "the 'substantial [curtailment]' of governmental functions which it would cause." *Id.* (quoting *McFadden v. Jordan* (1948) 32 Cal. 2d 330, 332, 345-346). Thus, in order to constitute a revision, an enactment must either be "so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions," or "accomplish . . . far reaching changes in the nature of our basic governmental plan . . . ." *Id.* at 223.

By contrast, a constitutional "'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." *Livermore v. Waite* (1894) 102 Cal. 113, 118-119. Importantly, even if an initiated enactment "will result in various substantial changes in the operation of the former system," if it "adds nothing novel to the existing governmental framework of th[e] state," it constitutes not a revision but an amendment. *Amador Valley*, 22 Cal. 3d at 228.

This Court's precedents confirm that Proposition 8 qualifies as a valid amendment, rather than a revision, to the state constitution. In *McFadden v. Jordan*, this Court invalidated a proposition amid circumstances in which it was "overwhelmingly certain" that the measure "would constitute a revision of the Constitution rather than an amendment." 32 Cal. 2d at 349-50. The sweeping proposition sought to add a new article consisting of 12 separate sections, 208 subsections, and more than 21,000 words. *Id.* at 334. This Court found that "at least 15 of the 25 articles contained in our present Constitution would be either repealed in their entirety or substantially altered by the measure, a minimum of four . . . new topics would be treated, and the functions of both the legislative and the judicial branches . . . would be substantially curtailed." *Id.* at 345. Though the *McFadden* measure proposed a single amendment, it was "obviously . . . multifarious," covering a "wide" and "diverse range" of subject matters, from retirement pensions to healing arts to surface mining. *Id.* at 345-46.

Proposition 8, which adds only one sentence to the state constitution by insertion of a new section without deleting or altering any pre-existing provision, does not mirror or even approach the level of quantitative and qualitative concern presented by the measure in *McFadden*. Proposition 8 inserts only fourteen words affecting only one section, whereas the sweeping *McFadden* proposition sought to insert more than 21,000 words affecting at least 15 sections--altering, on its face, two-thirds of the existing 55,000 word, 25 section constitution. Further, unlike the *McFadden* proposition, the single amendment enacted by Proposition 8 is not "multifarious" in effect. In a narrow definitional manner, it touches only one subject matter: the institution of marriage.

More recently, in *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, this Court struck down an initiative measure that sought to restrict and diminish a pre-existing, clearly expressed state constitutional provision. Titled the "Crime Victims Justice Reform Act," the measure sought to amend various provisions of article I. Thus affecting "only one constitutional article," the *Raven* initiative easily satisfied the quantitative effect prong of the revision amendment analysis. *Id.* at 351. This Court held, however, that one provision of the measure "contemplate[d] such a far-reaching change in our governmental framework as to amount to a qualitative constitutional revision, an undertaking beyond the reach of the initiative process." *Id.* at 341 (emphasis added).

Specifically, the qualitatively overreaching provision sought to amend article I, section 24 of the constitution (adopted in 1974), which "provided in relevant part that 'Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.'" *Id.* at 350. The proposed provision would have limited the state constitution such that it must be strictly construed according to the rights afforded by the federal constitution, nothing greater. *Id.* As such, the proposed provision would effectively "vest all judicial interpretative power, as to

fundamental criminal defense rights, in the United States Supreme Court." *Id.* at 352 (emphasis removed). Such a drastic transfer of power and wholesale diversion from the stated original purpose of the constitution would have been "devastating" from a qualitative standpoint. *See id.*

The present facts are easily distinguishable from those in *Raven*. Rather than restricting and diminishing a pre-existing, clearly expressed constitutional provision, Proposition 8 simply seeks to express a pre-existing constitutional definition in no uncertain terms. Proposition 8 involves no devastating transfer of power or wholesale diversion from the stated original purpose of the constitution. Unlike the proposition in *Raven*, which significantly altered the status quo of a broad range of criminal rights as they had existed since enactment of the 1974 constitutional provision, Proposition 8 only clarifies what has been the status quo of marital rights under the California Constitution since its adoption in 1850. The California Constitution has never expressly defined marriage as anything other than a union between a man and a woman. Thus, in contrast to the facts of *Raven*, there exists no constitutional precedent to support Petitioners' contention that Proposition 8 raises the "devastating" qualitative concerns that resulted in invalidation of the *Raven* initiative.

In contrast to *McFadden* and *Raven*, in *Amador Valley*, this Court upheld a proposition that amended the constitution by adding a new article that would substantially modify the California tax system. This Court upheld the measure on quantitative grounds where it contained about 400 words and was "limited to the single subject of taxation." 22 Cal. 3d at 224. On qualitative grounds, this Court affirmed the validity of the amendment even though it was "apparent" that the new article would "result in various substantial changes in the operation of the former system of taxation." *Id.* at 228 (emphasis added). This Court considered that the substantial changes "operate[d] functionally within a relatively narrow range to accomplish a new system of taxation." *Id.* Specifically, the article "change[d] the previous system of real property taxation and tax procedure by imposing important limitations upon the assessment and taxing powers of state and local governments." *Id.* at 218. The changes limited the tax rate on real property, restricted the assessed value of real property, limited the method of changing state taxes, and restricted local taxes. *Id.* at 220.

Despite opposition and concerns that the new tax system, modified by amendment, would "impose intolerable financial hardships and administrative burdens in different forms and with varying intensity on public entities, programs, and services throughout California," this Court honored its "solemn duty 'to jealously guard' the initiative power." *Id.* at 248. Reasonably resolving any doubts in favor of the initiative measure, this Court concluded that the new article survived the revision challenge and constituted a valid amendment. *Id.*

Under the rationale and holding of *Amador Valley*, the validity of Proposition 8 as a constitutional amendment cannot be doubted. Proposition 8 is similarly limited to a single subject (marriage), yet contains a mere fourteen words as compared to 400. Further, Proposition 8 will not result in "substantial changes" to the operation of the former system of institutionalized marriage in California. In fact, Proposition 8 effectuates no "change" to the constitution whatsoever. The effect of Proposition 8, rather, restores the status quo of marriage between a man and a woman as it has existed in California since the constitution's adoption in 1850, after only a brief judicially-mandated interruption of 143 days.

Petitioners contend that Proposition 8 constitutes a revision because it would effect a substantial change in the underlying principles of the basic governmental plan of the California Constitution by denying a fundamental right to a specified class of persons. Petitioners misunderstand the nature of this initiative. The voters of California, through the passage of Proposition 8, have simply clarified the substantive scope of that right. In this regard, the initiative at issue in the present case is no different from the initiative upheld as an amendment in *People v. Frierson* (1979) 25 Cal. 3d 142.

In *Frierson*, this Court held that a voter initiative approving a statutory scheme imposing the death penalty constituted an amendment rather than a revision. Importantly, this Court had previously held imposition of the death penalty "unconstitutional as constituting cruel or unusual punishment under former article I, section 6 (present § 17) of the California Constitution." *Id.* at 173 (citing *People v. Anderson* (1972) 6 Cal. 3d 628). As the *Frierson* Court acknowledged, "[o]n November 7 of the same year, the people responded by adopting, through initiative, a constitutional amendment . . . 'in effect negating . . . [the] prior ruling . . . in *People v. Anderson* . . . that the death penalty violated the California Constitution.'" *Id.* at 173, 184. Recognizing the power of the people of California to overturn its decision in this manner, however, the court upheld the initiated enactment in *Frierson* as an amendment because it did not accomplish a result so "sweeping" as to constitute a revision.

The circumstances surrounding the passage of Proposition 8 are virtually identical to those involved in *Frierson*. In June of this year, this Court concluded that the definition of the right to marry, as embodied in the Constitution of California at that time, included the right to marry another person of the same gender. *See In re Marriage Cases*, (2008) 43 Cal. 4th 757. Days ago, however, the people of California, exercising their constitutional power to initiate a constitutional amendment, negated that ruling by clarifying that the substantive scope of that right extends only to the union of two adults who are of opposite gender from one another, *i.e.*, a man and a woman. Proposition 8 does not change the purpose or function of the constitution's original plan for marriage; it simply clarifies it. This clarification is precisely the type of enactment this Court has previously labeled an "amendment," as it effects no sweeping or far reaching change in the constitutional scheme or governmental plan of the state but instead constitutes a "change within the lines of the original instrument as will . . . better carry out the purpose for which it was framed." *Livermore*, 102 Cal. at 119.

Petitioners' response that the present situation is distinguishable from *Frierson* because the definition of marriage found in Proposition 8 discriminates against a suspect class of persons on the basis of their sexual identity further reveals their misunderstanding of this amendment. Just as the amendment in *Frierson*—reinstating the death penalty and clarifying, contrary to this Court's prior holding, that its imposition did not constitute the infliction of cruel or unusual punishment within the meaning of the California Constitution—applied equally to all citizens, so too does the definition of marriage embodied within Proposition 8. As a result of the passage of the amendment at issue in *Frierson*, no citizen of California sentenced to death could argue that imposition of that penalty violated his right under the California Constitution to be free from cruel or unusual punishment, see CAL. CONST. art. I § 17 (former art. I § 6), because a majority of voters agreed to exclude imposition of the death penalty from the definition of the term "cruel

or unusual punishment." To be sure, imposition of this particular definition of "cruel or unusual punishment" (so as to exclude the death penalty) affects some citizens differently from others. This fact, however, does not necessitate the conclusion that the enactment is a constitutional revision rather than an amendment.

Likewise, as a result of the passage of Proposition 8, no citizen of California may argue that non-recognition of a union with another person of the same gender violates his or her fundamental right to marry under the California Constitution because a majority of voters have agreed that the substantive scope of that right is limited to unions only between two adults of opposite gender from one another. In other words, the voting majority have clarified that the definition of marriage, as recognized by the California Constitution, includes only a union between a man and a woman.[1] That this definition has a different impact on citizens wishing to enter into a union with an adult of the same gender, or with multiple adults of either gender, or, for that matter, with a child, does not alter the reality that Proposition 8 effects nothing more than a clarification of the definition of a single right recognized in the California Constitution.

The issue here is not, as Petitioners characterize it, "whether voters can eliminate the fundamental right to marry only for a particular group, based on a classification this Court has held to be suspect under the California's equal protection guarantee," see Strauss Amended Petition for Extraordinary Relief at 30 (emphasis removed), but whether the voting citizens may clarify, as they have done through Proposition 8, the definition of that right. Under this Court's precedents, Proposition 8 is therefore not a sweeping constitutional revision but rather a clarifying amendment to the constitution. *Accord Martinez v. Kulongoski* (2008) 220 Ore. App. 142 (holding, in light of substantially similar provisions of the Oregon Constitution, that a ballot proposition limiting the legal definition of marriage to include only unions between one man and one woman constituted an amendment rather than a revision to the state constitution).

Lastly, Petitioners' contention that a decision upholding the validity of Proposition 8 would undermine this Court's ability to enforce the fundamental guarantees of the equal protection clause in such a way as to protect minorities from discriminatory action by the majority is entirely incorrect. As Petitioners rightly acknowledge, see id. at 42, an enactment that would, by its language, bar only African-Americans from marriage or exclude only women from public schools would certainly implicate the equal protection guarantee because such an enactment would undoubtedly affect only that particular class of persons in a disparate manner. By contrast, Proposition 8 defines the scope of the right to marry in the state of California in a manner that applies with equal force to all citizens of the state.

[1] Again, in the 158-year history of the state of California, only for 143 days—and not as an expression of the will of the people but only as a result of the decision of four of this Court's sitting justices—has marriage been legally defined in any other manner in this state.

Conclusion

The request for a stay should be denied and the Petition should be dismissed.

Respectfully submitted,

AMERICAN CENTER FOR LAW AND JUSTICE

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PROOF OF SERVICE

I declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of Virginia Beach, Virginia. My business address is 1000 Regent University Drive, Virginia Beach, VA 23464. On November 17, 2008, I caused to be served the following document:

Letter Brief of *Amicus Curiae* the American Center for Law and Justice Recommending Denial of Request for Stay in *City and County of San Francisco, et al. v. Horton, et al.*, Case No. S168078

On the following persons at the locations specified.

BY UNITED STATES MAIL: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the firm's practices for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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I certify under penalty that the foregoing is true and correct and that this Certificate of Service was executed by me on November 17, 2008, at Virginia Beach, Virginia.

Erik M. Zimmerman